IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-432

EUGENE R. SCOTT, JEAN BROWN, ROBERT LEE HODGES, CARL GOSS, JULIAN LIONEL SCOTT, and LUTHER JOHNSON,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Eugene R. Scott, Jean Brown, Robert Lee Hodges, Carl Goss, Julian Lionel Scott and Luther Johnson pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 19, 1977.

CITATIONS TO OPINIONS BELOW

Petitioners' conviction and sentence were affirmed by the court below by summary opinion on July 19, 1977, and their Motion for Rehearing was denied on August 19, 1977. (Exhibits "A" and "B").

JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254.

QUESTIONS PRESENTED

1. Whether or not the trial judge erred in allowing the Government more than six peremptory challenges, exclusive of alternate jurors?

2. Whether or not the trial judge erred in overruling these six appellants' motions to sever?

3. Whether or not the evidence introduced at the trial was sufficient to exclude every other reasonable hypothesis save and except the guilt of Julian Lionel Scott and should directed verdict of acquittal been sustained?

STATEMENT OF THE CASE

On or about May 1, 1973, agents of the FBI commenced investigation of alleged illegal lottery operations in Atlanta, Georgia. After interviewing persons alleged to have been involved in lottery operations in Atlanta, Georgia, the appellants herein were arrested and charged with violation of §2703 and §2706(1), Title 26, Criminal Code of the State of Georgia, and violation of §1955 and 2, Title 18, United States Code, as well as §1952 and 2, Title 18, United States Code. All appellants pleaded not guilty to all charges.

A trial of unusual length began and the following appellants were convicted as follows:

Eugene R. Scott—Guilty as to Count 1 and 2.

Robert Lee Hodges—Guilty as to Count 1 and 2.

Carl Goss—Guilty as to Count 1 and 2.

Julian Lionel Scott—Guilty as to Count 1 and 2.

Luther Johnson—Guilty as to Count 1 and 2.

Jean Brown—Guilty as to Count 1 and 2—Not Guilty as to Count 3.

From these convictions appellants appeal to the United States Supreme Court.

The Government's proof was based, in addition to a considerable quantity of gambling records and documents, on the testimony of five of the nine unindicted co-conspirators (all of whom had been informally immunized), more than thirty FBI agents, several local police officers, some expert witnesses, telephone officials and some hotel employees.

The agents testified to various surveillances conducted on these appellants and some of their co-defendants. In addition, most of them testified regarding the seizure of numbers paraphernalia and records from the persons and residences of the appellant Moore and some of the other alleged co-conspirators. The bulk of the seized property came from the premises rented by either the defendant James Harding or Mary Stewart.

Telephone company employees produced records showing the call activity between phones listed to, or available for use by, Frank Moten in New York and New Jersey, Virgil Ogletree in Ohio, and James Harding, Donald Moore and Eugene Scott in Atlanta. Simply put, these records simply reflect the fact that calls were made between the various numbers. Save in very few instances, there was no evidence as to whether any of the alleged conspirators participated in any of these calls (Vol. 13, p.

129 et seq). And most assuredly there was no evidence as to the contents of any of these calls.

While the existing of any substantive proof of participation by Julian Lionel Scott has continued to defy all efforts by the Government to meaningfully articulate.

In support of their thesis evidence was offered through Betty Lyles and Ruby Hammons that they worked as office girls in the operation up until December, 1973 (Vol. 6, p. 173) and January, 1974 respectively. According to Betty Lyles, she never saw Gene Scott do anything involving the numbers (Vol. 7, p. 34), and Jean Brown was only involved as a substitute when Ruby Hammons was out sick (id., p. 25). John Allen and Donald Moore were viewed by them as the Bosses (id., p. 36). Julius Lyles was recognized as having a function (id., p. 39). Jerry Pierce, it was established through Ruby Hammons, originally turned in number plays, which they recorded (Vol. 6, p. 146). Later, after she was fired by John Allen, Hammons says Pierce and Julius "tried to book for a while" (Vol. 6, p. 168).

Julius Lyles testified to substantially the same facts, but added that by January, 1974 he teamed up with Jerry Pierce (Vol. 7, p. 83), who had by then gone into business for himself with Ruby Hammons (id., p. 83). As Lyles put it, he terminated his connection with the Moore lottery (id., p. 82). Jerry Pierce's evidence was that he would collect bets from people who played with him at 400-1 odds and he would pass their bets on as his bets at odds of 500-1 (id., pp. 145-146).

Next the evidence shows that James Harding became involved in the numbers in Atlanta in May or June, 1974. Both Harding (Vol. 18, pp. 198, 111) and Allen (Vol. 17,

p. 112) agree that at this point not only was Moore out, but the operation was a new and different one. All payments were made to Harding. They had different odds—that is 400-1 instead of 500-1. Moore paid (Vol. 17, p. 84). Harding had cut numbers, whereas Moore had none (ibid.). Allen knew where the office was when he worked for Moore (id., at 85), but had no such knowledge when James Harding booked the numbers (id., at 86, 91).

Harding's testimony on these same points was that his was a new and different business (Vol. 18, p. 107), and that the only connection he had with any of Moore's people was the fact that he hired John Allen to work for him (id., p. 108). He testified even with Gene Scott (id., p. 112) and his office girl, Mary Stewart, he was not conducting a 5-man operation (id., pp. 112-114).

REASONS FOR GRANTING THE WRIT

1. Whether or not the trial judge erred in allowing the Government more than six peremptory challenges, exclusive of alternate jurors?

Rule 24, Federal Rules of Criminal Procedure (b) Peremptory Challenges:

> "If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

Rule 24 (b) in non-capital felony cases allows the Government six peremptory challenges and the defendants 10. The court in its discretion may allow additional peremptory challenges if there is more than one defendant. There is no authority for allowing additional peremptory challenges to the Government. See *New England Enterprises, Inc. v. US*, CA 1st, 1968, 400 Fed 2d 58, 68, 69 certiorari denied 89 S.Ct. 654, 393 U.S. 1036.

Although this rule governing allowance of peremptory challenges in multi-defendant cases doesn't authorize a court to grant the Government more than 6 peremptory challenges over the objection of defendants, the parties can stipulate to allow a greater number. See *US v. Mitchell*, DCDC 1974, 384 Fed. Supp. 564, 565.

On November 4, 1975 during the selection of the jury the court gave seven peremptory challenges to the Government and 12 to the defense. The defendants objected to the Government having an additional peremptory but the court overruled the objection. See Supplemental Record on Appeal, Vol. 1, pp. 4, 5.

The Government proceeded to strike seven peremptorily and the defense twelve. See Exhibit A, attached hereto and made a part hereof actually showing the number of strikes by Government and defense.

Rule 24(b) rests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such challenges to be exercised separately or jointly. See US Code Service, Criminal Procedure Court Rules, page 77.

In the New England case, supra, while holding that, in the absence of a timely objection, the trial judge's handling of peremptory challenges had been neither plain

error nor a basis for reversal, recognized that proper objection to the granting of peremptories should be grounds for *reversal.* The court stating that in order for the defendants to obtain review of the alleged error, it was necessary that the point be raised by objection in the proceedings below.

Here the objection was made, nor was any agreement entered into between the parties for the Government to have an additional challenge.

The appellants herein assign this additional challenge as error so grievous as to constitute plain error so as to warrant reversal of the defendants' convictions.

2. Whether or not the trial judge erred in overruling these six appellants' motions to sever?

On April 10, 1975, defendants Hodges, Goss, Johnson and Julian L. Scott filed a pre-trial motion for severance (See transcript of record p. 92-102, Vol. 1). One of the grounds referred to in the motion was self-incrimination and the fact that various transactions occurred which were unconnected to these defendants as well as confession.

Motion to Sever was overruled.

Federal Rules of Criminal Procedures, No. 14:

> "If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the Government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the Government intends to intro-

duce in evidence at the trial (As amended effective July 1, 1966.)"

The defendant herein suspected that one or more of the listed defendants could conceivably change their plea of not guilty to guilty and enter a confession to relieve or attempt to relieve themselves from any criminal liability.

Consequently, any confession by one defendant named herein could clearly prejudice the remaining defendants if they are inseparably connected. See *Schaffer v. US*, (CA5), 221 F.2d 17. "Denial of severance was error where the confession of one defendant clearly prejudiced the second defendant and the two were so inseparably connected that the jury could not have returned a verdict of guilty as to one and not guilty as to the other."

This rule does not relate to the propriety of an indictment but refers instead to the fairness of joinder in cases in which the evidence will jeopardize a co-defendant's right to a fair trial. (1970) *US v. Piepgrass*, (CA9), 425 F2d 194.

That during the conduct of the trial to wit: On November 10, 1975, defendants Hodges, Goss, Johnson and Julian L. Scott and Jean Brown and Eugene Scott filed a motion to sever again alleging that the conduct of attorney Cohen was embarrassing to these defendants and detrimental to the due process of law as guaranteed to each of these defendants. That in addition, these defendants alleged that the conduct of said attorney had a disrupting influence that affected the deliberation of the jury. They objected further that associate-counsel Slotnick absented himself from the trial of said case without permission during critical stages, and that said defendants believe that this was interpreted by the jury that the

attorneys had little interest in the outcome of said case. The defendant further alleged that the conduct of the attorneys representing co-defendants James and Lillian Harding, were not conducive to a fair trial (See Vol. 1 T. of Records, pp. 457 and 458). This Motion to Sever was overruled.

Finally, on December 2, 1975 these six defendants filed an additional motion for severance alleging that the testimony of Special Agent King of the FBI, that co-defendant James Harding accepted the sum of $1,000.00 from Special Agent King in return for his cooperation, came as a complete surprise to these six defendants and affected the credibility of co-defendant Harding and put him in a light of having confessed in an attempt to relieve himself from any criminal liability and further that this effort to extricate himself clearly prejudiced the remaining defendants.

Defendants further alleged that this testimony was completely hostile to their defense and that the defenses of these defendants are antagonistic. (See T. of Record, pp. 532-533, Vol. 1)

This additional Motion to Sever was overruled.

"In weighing the competing factors under this rule regarding severance the trial court must evaluate the alleged factual and legal compactness of the consolidated trial and the government's interest in judicial economy with the potential prejudice to any of the defendants. If, as a practical matter, the nature of the offenses or of the evidence are of such a character or are so complicated that a jury could not reasonably be expected to separate the indictments or the defendants and to evaluate properly and individually against each separate defendant on each separate charge, then the trial judge should sever the trials." *US v. Harris* (1972, CA5, FLA) 458 F2d 670.

Federal Rules of Criminal Procedure, 8B, allows the joinder of defendants in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. These four defendants argue emphatically that even when the allegations are considered in the light more favorable to the Government, that their activity constituted a minute participation and that their participation could not reasonably be construed as a "series".

The period referred to in the indictment over which the four counts were derived began on or about May 1, 1973, and continued until on or about September 24, 1974, a period of time approximating almost 17 months. (See *US v. Grasso, Jr.*), 55 Fed Rules Decisions, Page 288 . . . Decided May 5, 1972, see headnotes 1, 2, 3, 4, and 5, wherein it was held that a period of approximately one year and ten months was beyond permissible limits of rule providing that two or more defendants may be charged in same indictment or information if they are alleged to have participated in same transaction or in same series of acts or transactions constituting an offense or offenses, and thus granting of severance was required.

If the joinder attempted does not fall within the limits of Rule 8(b), severance *must be* granted. *United States v. Gougis*, 374 F2d 758 (7th Cir. 1967); *Metheany v. United States*, 365 F2d 90 (9th Cir. 1966); *King v. United States*, 335 F2d 700 (1st Cir. 1966); *Ingram v. United States*, 272 F2d 567 (4th Cir. 1959).

The indictment here, manifests at best a series of separate and unconnected offenses. See, *McElroy v. United*

States, 164 US 750, 17 S.Ct. 31, 41 LEd 355 (1896); *Kotteakos v. United States*, 328 US 750, 66 S.Ct. 1239, 90 LEd 1557 (1946); *Schaffer v. US*, 362 US 511, 80 S.Ct. 945, 4 LEd 2d 921 (1960); *United States v. Goss*, 329 F2d 180 (4th Cir. 1964).

The case of *United States v. Balistrieri*, (346 F. Supp., p. 336) allows that severance should be granted considering the limited participation charged against defendant and considering his just concern about Trier of facts ability to afford him an independent determination of guilt or innocence.

Because of the limited participation charged against Balistrieri in the indictment, I believe that he is justly concerned about the ability of the Trier of fact to afford him an independent determination of his guilt or innocence. Motions to sever are committed to the sound discretion of the court and in my judgment, the better exercise of that discretion requires a separate trial for Mr. Joseph F. Balistrieri. *Opper v. US*, 348 US 84, 94, 75 S.Ct. 158, 99 LEd 101 (1966); *United States v. Bornstein*, 447 F2d 747 (7th Cir. 1971); *United States v. Kahn*, 381 F2d 824, 838 (7th Cir. 1967); *United States v. DeCesaro*, 54 FRD 596 ED Wis. (1972).

3. Whether or not the evidence introduced at the trial was sufficient to exclude every other reasonable hypothesis save and except the guilt of Julian Lionel Scott and should directed verdict of acquittal been sustained?

The evidence introduced at the trial was insufficient to exclude every other reasonable hypothesis save and except the guilt of Julian Lionel Scott.

Motion was made for a directed verdict of acquittal on his behalf and was overruled.

A careful review of the transcript will indicate that the evidence therein was not sufficient to convict Julian Lionel Scott of the two charges upon which the jury found him guilty.

Substantial evidence which will sustain a conviction is evidence that a reasonably minded jury could accept as adequate and sufficient to support the conclusion of guilt beyond a reasonable doubt.

Palin error rule can be invoked only where the irregularity was obvious or manifest. Federal Rules of Criminal Procedure rule 41(e), 18 USCA.

When a jury verdict is challenged on the ground of insufficiency of evidence, the appellate court must sustain the verdict "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 1944, 315 US 60, 80, 62 S.Ct. 457, 469, 86 LEd 680, 704. In this context, "substantial evidence" means evidence that a reasonably minded jury could accept as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. *United States v. Reynolds*, 5 Cir. 1975, 511 F2d 603, 606.

Petitioners submit that they desire for a re-hearing to submit the proposition that they were showed natural prejudice in that the Government's strikes were used for the sole purpose of eliminating members of the Negro race and used all of their strikes for that purpose, thus depriving the defendants of their right to a fair and impartial trial. The additional challenges did abridge these appellants' rights.

CONCLUSION

In view of the considerations set forth above, petitioners respectfully submit that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

/s/ MURRAY M. SILVER

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent to the Honorable Michael E. Moore, Attorney, Department of Justice, Washington, D. C. and a copy to the Solicitor General of the United States, Tenth & Constitution Avenues, Washington, D. C., was mailed, postage prepaid.

/s/ MURRAY M. SILVER

MURRAY M. SILVER

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-1438

D. C. Docket No. CR-75-86A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EUGENE R. SCOTT, JEAN BROWN, ROBERT LEE HODGES, CARL GOSS, JULIAN LIONEL SCOTT, LUTHER JOHNSON, VIRGIL OGLETREE, DONALD MOORE, JAMES HARDING and LILLIAN HARDING,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

Before MORGAN and Fay, Circuit Judges, and HUNTER*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED.

July 11, 1977

Issued as Mandate:

*Senior District Judge of the Western District of Louisiana, sitting by designation.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-1438

[Filed in Clerk's Office, Aug. 19, 1977,
Edward W. Wadsworth, Clerk.]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EUGENE R. SCOTT, JEAN BROWN, ROBERT LEE HODGES, CARL GOSS, JULIAN LIONEL SCOTT, LUTHER JOHNSON, VIRGIL OGLETREE, DONALD MOORE, JAMES HARDING and LILLIAN HARDING,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITIONS FOR REHEARING

(August 19, 1977)

Before MORGAN and Fay, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

On behalf of all appellants except James Harding & Lillian Harding IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ EDWIN F. HUNTER, JR.

EDWIN F. HUNTER, JR.
United States District Judge

*Senior District Judge of the Western District of Louisiana, sitting by designation.

Form 703-3